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No. 06-

06-345

IN THE

Supreme Court of the United States

DOROTHEA DARAIO

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

STANFORD SHMUKLER*
JOEL M. SHMUKLER
105 Cheswold Court
Wayne, PA 19087
(610) 647-2058

BERNARD L. SIEGEL
Counsel of Record
1515 Market Street
Suite 1915
Philadelphia, PA 19102
(215) 751-9830

Counsel for Petitioner

* Stanford Shmukler, Esquire, a member of the Bar of this Court, passed away during the final stages of the preparation of this Petition.

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(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the standard for admissibility of evidence of other crimes, wrongs and acts under Federal Rule of Evidence 404(b) to prove "intent" should require a high degree of similarity between the intent involved in the other acts, and the intent involved in the charged crime.

2. Whether the admission of evidence of other crimes, wrongs and acts under Federal Rule of Evidence 404(b) violates the basic principles and notions of fundamental fairness as understood by the Framers, and the modern jurisprudence of the rule has so far departed from its historical groundings, that it violates the Due Process and Double Jeopardy Clauses of the United States Constitution.

3. Whether, in light of nearly two decades of experience illustrating problems with the application of this Court's decision in *Huddleston v. United States*, 485 U.S. 681 (1988), this Court should consider whether that case was wrongly decided, or, in the alternative, whether that precedent requires refinement and clarification in order to comport with the Constitutional requirements of the Due Process Clause of the United States Constitution.

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Appendix B — Judgment In A Criminal Case Of The United States District Court For The District Of New Jersey Dated And Filed May 3, 2005 ..... 26a

Petitioner Dorothea Daraio respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Third Circuit entered in the above-captioned proceeding on April 10, 2006.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Third Circuit rendered on April 10, 2006, has been officially reported at 445 F.3d 253 and is reprinted at App.A

BASIS FOR JURISDICTION

The Opinion and Judgment of the Court of Appeals for the Third Circuit was filed April 10, 2006. No Petition for Rehearing was filed. On June 27, 2006, an Application for Extension of Time for filing this Petition for Writ of Certiorari was submitted to Mr. Justice Souter, who is designated as the Circuit Justice for the Third Circuit. On June 30, 2006, that Application was granted, extending the time for filing the Petition until September 7, 2006.

Jurisdiction of this Court to review the Judgment of the Court of Appeals for the Third Circuit, entered on April 10, 2006, is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> **AMENDMENT V**: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty, or property without due process of law . . ."

Rule 404 of the Federal Rules of Evidence provides, in pertinent part:

> Rule 404. **Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes.**
>
> **(a) Character Evidence Generally.** —Evidence of a person's character or trait of character is not admissible

for the purpose of proving action in conformity therewith on a particular occasion, except:

* * *

(b) Other Crimes, Wrongs, or Acts. — Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

26 U.S.C. § 7201 provides, in pertinent part:

"§ 7201: **Attempt to evade or defeat tax.**

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, in addition to other penalties provided by law, be guilty of a felony . . ."

STATEMENT OF THE CASE

Following a three-year investigation, Petitioner was indicted on April 13, 2004, for one count of tax evasion, under 26 U.S.C. § 7201. The indictment charged her with knowingly and willfully attempting to evade and defeat the payment of a substantial part of the federal payroll taxes due from Eagle Security, Inc., for the calendar year 1998, amounting to approximately $222,607.40. Mrs. Dario was alleged to have directed clients of Eagle Security, Inc. to pay the unpaid balances due to Eagle Security, Inc., accounts which had been levied by the I.R.S, to E.S.S. Co. instead. A superseding indictment was filed on August 17, 2004, also charging one count of tax evasion, but expanding the dates of the offense charged to "the quarterly periods that included April 1994 through April 1998."

At trial, over the continuing objections of the Petitioner, a substantial amount of the evidence shown to the jury was ostensibly introduced pursuant to the "intent" exception of Fed.R.Evid. 404(b).[1] That evidence pertained to alleged uncharged failures to file returns or pay taxes for prior businesses including Mrs. Daraio's business. The evidence included "other acts" which were significantly dissimilar from the charged crime of tax evasion. Specifically, the "other acts" evidence concerned "prior tax non-compliance" but ***not*** tax evasion. Some of the evidence pertained to events which allegedly occurred five years prior to the events which were the subject of the indictment (and far outside the statute of limitations) and more than eleven years prior to the trial; other evidence pertained to tax filings by her and her husband, involving events which occurred more than fifteen years prior to the events which are the subject of the current indictment and more than twenty-one years prior to the trial.[2]

The Government offered evidence at trial that Petitioner, Mrs. Daraio, managed Quest Investigators, a company owned by her husband, and which went out of business in 1993 owing the IRS more than $800,000. In early 1994, Mrs. Daraio opened

[1] The 404(b) evidence is summarized in the Third Circuit opinion. App. A, 3a-4a. By Counsel's rough calculation, the government began their case with evidence of 60 or more alleged violations of federal tax laws, *other* than the diversion of receivables to evade taxes as charged in the indictment. Significantly, Mrs. Daraio had never been charged with any of these acts, nor were any of those acts similar to the crime she was charged with. For the first several hours of trial, there was no mention of the crime charged in the indictment. However, the jury was certainly made aware Mrs. Daraio, her husband, and their companies had allegedly committed numerous *other* violations of the tax code.

[2] With respect to some of the evidence which pertained to a prior business belonging to her husband only, the Third Circuit wrote: "The record is ***unclear*** as to the degree of Daraio's involvement in ESS-Co./ Quest Investigators. ESS-Co. is a different entity than E.S.S. Co., and ESS-Co. is not the corporation that Daraio allegedly created for purposes of evading tax levies as charged in the indictment." App. A, 4a, FN. 4. (Emphasis supplied).

Eagle Security, Inc., which she owned and operated. Eagle never paid, nor was it held responsible for, Quest's tax obligations. Between April 1994 and April 1998, Eagle paid payroll and withholding taxes only sporadically. The IRS filed a tax lien against the Corporation, followed by a series of other liens. In September 1996, the IRS served a levy on Eagle's corporate bank account, but collected only about $2,000. Subsequently, the IRS placed additional levies on accounts receivable belonging to Eagle.

The evidence showed that, between the filing of the initial liens and the filing of the subsequent levies, Mrs. Daraio had created a new company, E.S.S. Co. That company sent out correspondence to the levied customers, requesting payment of the balances owed to Eagle. Cheryl Daraio, the Petitioner's daughter, testified that she was the one who sent out the bills to the levied accounts by mistake, and that her mother did not know, nor did she direct, those actions. In fact, most of the letters were signed by Cheryl Daraio. Mrs. Daraio also testified and denied prior knowledge of those letters.

The jury rendered a verdict of guilty on November 10, 2004. Post-trial motions were denied, and a sentence of 41 months imprisonment was imposed on April 29, 2005. A timely appeal followed. On April 10, 2006, the Third Circuit Court affirmed her conviction.

REASONS FOR GRANTING THE PETITION

This case presents the Court with a number of discrete, yet interrelated issues, all relating to Federal Rule of Evidence 404(b), which is the most frequently litigated issue in the Federal Courts. The intervention of this Court is necessary to resolve an issue about which the Circuit Courts are split. The Circuit Courts use a dizzying array of conflicting standards in determining the admissibility of evidence of other crimes, wrongs and acts. The jurisprudence that has evolved is not only confusing but also has so far departed from our basic notions of fundamental fairness as envisioned by the Framers, as to constitute a violation of the Due Process rights of defendants in criminal cases.

The case is of great importance in interpreting and applying the Federal Rules of Evidence and the Due Process Clause. It is critical to realize that interpretation of the Federal Rules of Evidence by the federal courts also serves as a model for the adjudication of evidentiary issues under codes of evidence and the common law of the states; thus this Court's guidance reaches far beyond the federal courts, impacting the jurisprudence of the various state courts throughout our nation even though the issue involves a Federal Rule of Evidence. This Court must ensure that the Due Process Clause is interpreted in a manner consistent with the understanding of fundamental fairness as conceived by the framers of our Constitution, and in a manner consistent with the sources of that understanding, including the Common Law.

Finally, it is respectfully submitted that this Court should reconsider its decision in *United States v. Huddleston*, 485 U.S. 681 (1988). Nearly two decades of practical experience in applying that precedent has shown that the case was wrongly decided, or, in the alternative, that this Court needs to provide additional guidance to help resolve a number of issues that have proven problematic, resulting in uneven and inconsistent application of the precedent, giving rise to tremendous volumes of criticism by scholars, professional organizations, by trial lawyers and the lower Courts.

I. THERE IS A SPLIT IN THE CIRCUITS IN THE STANDARD FOR THE ADMISSIBLITY OF EVIDENCE OF OTHER CRIMES, WRONGS AND ACTS TO PROVE "INTENT" UNDER FEDERAL RULE OF EVIDENCE 404(b)

When it comes to the standard for admission of evidence under the "intent" exception of Fed.R.Evid. 404(b), the Circuit Courts of Appeals use a variety of different, inconsistent and conflicting standards. In particular, the standard for admission of evidence of other crimes, wrongs and acts to prove "intent" is a hodgepodge of vague, ambiguous, and conflicting standards when it comes to the requisite degree of "similarity" between

the charged crime and those other acts. These problematic standards require this Court's intervention. It should be noted, though, that the conflicting standards apply not only to "intent" but also to the admission of evidence of extrinsic acts under other theories such as knowledge and motive as well.

Rule 404(b) has been the subject of more appellate litigation than any other issue in the Federal Courts.[3] The Rule has been subject to frequent comment and criticism by scholars, notably including the highly respected and recently deceased Judge Edward R. Becker of the Third Circuit.[4]

A. THE STANDARD IN THE THIRD CIRCUIT IS FLAWED

The Third Circuit, from which the instant case arises, uses two different and conflicting standards in different cases, and sometimes within one case. One standard used by the Third Circuit is that "intent must be an element of the crime charged and the evidence offered must cast light upon the defendant's intent to commit the crime." *United States v. Himmelwright*, 42 F.3d 777, 782 (3d Cir. 1994). The second standard, used in

[3] David P. Leonard, *The Use of Uncharged Misconduct Evidence to Prove Knowledge*, 81 Neb. L. Rev. 115, 116 (2002) ("No rule of evidence has been litigated as frequently and with as much inconsistency in outcome as the 'other crimes, wrongs, or acts rule"); see also, Gavin M. Bowie, *Rule 404(b)'s "Other Acts" Character Flaw*, 54 S.C.L. Rev. 495 (2002) ("The confusion surrounding the technicalities of the rule extends to the courts. Rule 404(b) has accounted for a greater number of published judicial opinions than any other provision in the Federal Rules of Evidence").

[4] See Edward R. Becker and Aviva Orenstein, *Is the Evidence All In?: A Proposal for Revising the Federal Rules*, 78 A.B.A.J. 82 (1992) ("There are other areas of evidence law also deserving reconsideration. For example, there is much judicial dissatisfaction with the federal evidence rules governing admission of character evidence, especially Rule 404(b), which routinely enables prosecutors to present highly prejudicial evidence of other criminal conduct by defendants"). See also Fed.R. Evid. 404(b) Advisory Committee's note on 1991 amendment ("Rule 404(b) has emerged as one of the most cited Rules in the Rules of Evidence").

other Third Circuit cases, is that the government must "clearly articulate how that evidence fits into a chain of logical inferences, no link of which can be the inference that because the defendant committed [other] offenses before, he therefore is more likely to have committed this one." *United States v. Sampson*, 980 F.2d 883, 887 (3d Cir. 1992). *Sampson* requires that:

> "The district court, if it admits the evidence, must in the first instance, rather than the appellate court in retrospect, articulate reasons why the evidence also goes to show something other than character. Unless the reason is apparent from the record, a mere list of the purposes found in Rule 404(b) is insufficient. The district court must put a chain of inferences into the record, none of which is the inference that the defendant has a propensity to commit this crime."

In the instant case, the Third Circuit Court of Appeals ostensibly followed the "chain of logical inferences" test, App. A, 20a, citing *Sampson* as authority for allowing 404(b) evidence to be used, and concluded that intent was an issue even though Mrs. Daraio never disputed intent at trial. However, that was incorrect; Mrs. Daraio's defense was that she didn't commit, nor direct, nor have any prior knowledge of the charged crime; the acts were committed by her daughter, Cheryl, thus intent never was at issue.

The Court of Appeals concluded, erroneously, that "evidence that she committed similar offenses and had a history of non-compliance with the IRS was admissible and relevant to prove willfulness." App. A, 22a. However, the 404(b) evidence of "prior tax non-compliance" involved alleged failures to file and failures to pay, acts which are significantly dissimilar to the charged crime. Further, the trial Judge instructed the jury that they could consider the 404(b) evidence for intent, motive and absence of mistake or accident, not just for intent.

The post-hoc rationale of the Third Circuit not only ignored and misconstrued the trial evidence, but also ignored the overbreadth of the Judge's instructions in this case which

directed the jury that they could consider the evidence for purposes other than those for which it was offered. The Third Circuit also ignored the failure of the trial Judge to actually "articulate reasons why the evidence also goes to show something other than character" by putting this "chain of inferences into the record" as required by *Sampson*, 980 F.2d 883, 888. Instead, the trial court relied upon the mere parroting of potentially acceptable rationales, violating the dictates of *Sampson* and raising the "laundry list" problem discussed, *infra*, Argument I C.[5]

The problem, however, is not just with the application of the *Sampson* standard to the facts of this case, but the fact that the cited standards themselves are vague and ambiguous and not susceptible to proper application. The result is the routine acceptance of such evidence by trial courts, and rubber stamping by the appellate courts of those decisions. The trial court's decision is then reviewed using an apologetic abuse of discretion standard. App. A, 10a. Intent is at issue in virtually every crime,[6] and the requirement of "cast[ing] light upon the defendant's intent" or "fitting into a chain of logical inferences" provides scant guidance to the trial court. The result is that the exact "pure propensity" evidence prohibited by Rule 404(a) is routinely admitted in trials. The vague standard makes uniformity in decision making difficult or impossible. Finally, the standard used in the case at bar conflicts with another standard used in the same court, and with standards used by other circuit courts, as discussed *infra*, in Argument I B.

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[5] See also Notes 18 and 19, *infra*.

[6] See Vivian Rodriguez, *The Admissibility of Other Crimes, Wrongs or Acts Under the Intent Provision of Federal Rule of Evidence 404(b): The Weighing of Incremental Probity and Unfair Prejudice*, 48 U. Miami L. Rev. 451, 456-67 (1993) (Intent is an element in almost every crime; modern treatment of the admissibility of intent evidence often doesn't distinguish between general and specific intent crimes).

B. OTHER CIRCUITS USE A VARIETY OF DIFFERENT, FLAWED, AND CONFLICTING STANDARDS

The First Circuit uses a standard which requires "special relevance." [7] The First Circuit also uses a standard which requires "sufficient similarity." [8] The Second Circuit has adopted yet another standard, using an "inclusionary approach" which provides little or no guidance regarding the requisite similarity for other acts evidence.[9] The Second Circuit does, however, require "a similarity or connection." [10]

The Fourth Circuit uses yet another standard whereby "the more similar the prior act is in terms of physical similarity or

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[7] In *United States v. Sebaggala*, 256 F.3d 59, 67 (1st Cir. 2001) the Court held, "[T]he proffered evidence must not merely show a defendant's reprehensible character or predisposition towards knavery, but rather, must possess some special relevance to a disputed issue in the case." [Citations omitted].

[8] In *United States v. Landrau-Lopez*, 444 F.3d 19, 24 (1st Cir. 2006), the Court set forth the standard:

> "('[W]here . . . the other bad act evidence is introduced to show knowledge, motive, or intent, the Rule 404(b) exceptions to the prohibition against character evidence have been construed broadly'). The other bad act need not be identical to the crime charged so long as it is sufficiently similar to allow a juror to draw a reasonable inference probative of knowledge or intent."

[9] See *United States. v. Edwards*, 342 F3d 168, 176 (2d Cir. 2003):

> "We have adopted an inclusionary approach to evaluating Rule 404(b) evidence, which allows evidence to be received at trial for any purpose other than to attempt to demonstrate the defendant's 'criminal propensity.'"

[10] See *United States v. Garcia*, 291 F.3d 127, 137 (2d Cir. 2002):

> "The government may not invoke Rule 404(b) and proceed to offer, carte blanche, any prior act of the defendant in the same category of crime. The government must identify a similarity or connection between the two acts that makes the prior act relevant to establishing knowledge of the current act. See, e.g., *Pitre*, 960 F.2d at 1118."

mental state to the act being proved, the more relevant it becomes."[11] The Fifth and Eleventh Circuits use a more stringent test, known as the *Beechum* test, *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979),[12] requiring that 404(b) evidence offered to show "intent" must involve the "same intent" as the charged crime.[13] The Sixth, Seventh and Eighth Circuits use a "sufficient similarity" test.[14] [15] However, that test is qualified by another test; the evidence must "support an inference

[11] See *United States v. Queen*, 132 F.3d 991, 997 (4th Cir. 1997):

> "[W]e hold that evidence of prior acts becomes admissible under Rules 404(b) and 403 if it meets the following criteria: (1) The evidence must be relevant to an issue, such as an element of an offense, and must not be offered to establish the general character of the defendant. In this regard, the more similar the prior act is (in terms of physical similarity or mental state) to the act being proved, the more relevant it becomes . . ."

[12] See *United States v. Moree*, 897 F.2d 1329, 1335 (5th Cir. 1990):

> "Evidence of prior extrinsic acts is relevant to the intent manifested by the defendant during the offense for which he is charged if two criteria are met. *United States v. Beechum*, 582 F.2d 898, 909-16 (5th Cir. 1978) (en banc), (1979). First, the intent required to make the previous activity illegal must be the ***same intent*** required to convict the defendant of the offense charged." (Emphasis added).

[13] See *United States v. Cardenas*, 895 F.2d 1338, 1343 (11th Cir. 1990), (following the 5th Circuit *Beechum* test).

[14] See *United States v. Burkett*, 821 F.2d 1306, 1309 (8th Cir. 1987):

> "Burkett also contends that the evidence is not relevant because the prior acts were not "sufficiently peculiar, unique or bizarre as to constitute [his] personal signature on each crime." Appellant's Brief at 21. This overstates the similarity necessary to admit such evidence. When admitted for the purpose of showing intent, the prior acts need not be duplicates, but must be sufficiently similar to support an inference of criminal intent."

[15] See *United States v. Benton*, 852 F.2d 1456, 1468 (6th Cir. 1988) (following *Burkett's* sufficient similarity test); accord *United States v. Brown*, 250 F.3d 580, 584 (7th Cir. 2001) (sufficient similarity test).

of criminal intent," which serves in practice to significantly dilute the "sufficient similarity" standard, producing vagueness, ambiguity and superficial analysis. The Ninth Circuit uses yet another standard where "similarity" is not always required.[16] The Tenth Circuit uses yet another standard, requiring an unspecified degree of "similarity."[17]

C. MANY COURTS USE A "LAUNDRY LIST" WHICH CREATES A FLAWED "NON-STANDARD"

Frequently, courts appear to use an even more amorphous standard, admitting evidence citing a "laundry list" of reasons under Rule 404(b). This fails to distinguish the purpose for which the evidence is sought to be admitted.[18] While this practice is

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[16] See *United States v. Ramirez-Jiminez*, 967 F.2d 1321, 1326 (9th Cir. 1992):

> "When articulating tests for admission of evidence under Rule 404(b), we have sometimes made a showing of 'similarity' a requirement. See, e.g., *Sarault*, 840 F.2d at 1485. At the same time, we have made it clear that 'similarity is not always a prerequisite under Rule 404(b).'" *United States v. Miller*, 874 F.2d 1255, 1269 (9th Cir. 1989)."

[17] In *United States v. Zamora*, 222 F.3d 756, 762 (10th Cir. 2000):

> "This court has previously recognized the probative value of uncharged acts to show motive, intent, and knowledge, whether the acts involved previous conduct or conduct subsequent to the charged offense, as long as the uncharged acts are similar to the charged crime and sufficiently close in time. Moreover, although the uncharged crime must be similar to the charged offense, it need not be identical. *United States v. Gutierrez*, 696 F.2d 753, 755 (10th Cir. 1982)." [internal citations omitted]

[18] *United States v. Harvey*, 845 F.2d 760, 762 (8th Cir. 1988); see also, *United States v. Garcia-Meza*, 403 F.3d 364, 369 Fn 1 (6th Cir. 2005) (Complaint that a "laundry list" limiting instruction did not adequately advise the jury of the limited purposes for which the evidence was admitted: "Where a single, legitimate purpose supports the admission of the evidence under Rule 404(b), a trial court's admission

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frequently criticized, it is not impermissible.[19] Many courts do not distinguish 404(b) evidence offered to prove "intent" from evidence offered to prove knowledge, motive or opportunity. Nor do they provide a clearly articulated rationale for the admission of such evidence. This practice fails to distinguish the rationale for the admission of "intent" evidence from other 404(b) exceptions such as motive or opportunity. This practice is flawed because there are different rationales for the admission of evidence pertaining to the various exceptions under Fed.R.Evid 404(b). This permits the government and the court to simply parrot the list of reasons without articulating a specific rationale for the admission of such evidence. Most Circuits apply the abuse of discretion standard in reviewing the trial court's determinations of 404(b) and 403 issues. The failure of many trial courts to articulate a specific rationale for their findings prevents meaningful appellate review.[20]

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of that evidence for additional reasons allowed under the rule does not constitute plain error"); *United States v. Hardwell*, 80 F.3d 1471, 1491-92 (10th Cir. 1996) ("Laundry list" limiting instructions that simply recite all of the purposes listed by Rule 404(b) are disapproved because they do not adequately advise the jury of the limited purposes for which the evidence was admitted); *United States v. Powers*, 59 F.3d 1460, 1478 (4th Cir. 1995) (Judge Lay dissenting, argues that limiting instructions by the court, consisting of a laundry list of permitted uses contained in the rule, was simply incapable of limiting the damage caused by this evidence).

[19] See *United States v. Mothershed*, 859 F.2d 585, 589 (8th Cir. 1988) (discouraging district courts from using "laundry list" approach when instructing the jury on Rule 404(b) evidence, but holding such practice "is not in itself a basis for reversal"); accord, *United States v. Harvey*, 845 F.2d 760, 762 (8th Cir. 1988).

[20] See Rodriguez, *supra*, Note 6, 48 U. Miami L. Rev. 451, 477-78 (The failure of the Courts to predicate the admission of 404(b) evidence upon a clear "need" for such evidence by requiring that there be an actual issue in dispute, produces a "negligent" application of Rule 403 analysis resulting in "an empty gesture that results in the mechanical

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Absent such an articulated rationale, it is hard to imagine how the court can begin to reasonably conduct the requisite analysis of relevance under Fed.R.Evid. 401, and the requisite analysis under Fed.R.Evid. 403, which requires the court to weigh probative value versus prejudicial value.

Furthermore, appellate courts using "laundry list" rationales engage in what amounts to a retrospective analysis. Although the evidence may not have been admissible for the purpose offered, if it is found that the evidence could have been admitted for some other reason, no error is found. Furthermore, "harmless error" analysis is applied,[21] ignoring exactly how damaging the admission of this type of evidence is.[22] This type of analysis ignores the fact that the evidence was offered and admitted for one purpose and that the jury was instructed to consider it for that purpose only, but the Appellate Courts subsequently, and routinely, find that the proffered evidence was not admissible for that purpose, but was admissible under some other Rule 404(b) theory.

Because of these many significant variations in interpreting and applying this controversial and important Rule of Evidence,[23] this Court should grant review, interpret and clarify the standards for admission evidence under Rule 404(b).

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admission of other acts evidence, in spite of the policies underlying Rule 404(b). In addition, the current standard of review which affords trial courts maximum discretion in applying the balancing test provides no appellate safeguard against the negligent application of the Rule 403 balancing test").

[21] See, for example, *United States v. Edwards*, 342 F.3d 168, 178-79 (2d Cir. 2003).

[22] Justice Souter wrote in *Old Chief v. United States*, 519 U.S. 172, 180, (1997): ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged").

[23] See Gavin M. Bowie, *Rule 404(b)'s "Other Acts" Character Flaw*, 54 S.C L. Rev. 495, 515-16 (2002) ("The two trends of relevant (Cont'd)

II. THE USE OF EVIDENCE OF OTHER CRIMES, WRONGS AND ACTS UNDER FED.R.EVID. 404(b) VIOLATES THE DUE PROCESS AND DOUBLE JEOPARDY CLAUSES OF THE CONSTITUTION

Federal due process is intended to safeguard those "fundamental conceptions of justice which lie at the base of our civil and political institutions." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).[24]

Since intent is at issue in so many federal criminal cases,[25] Rule 404(b) is the exception that threatens to swallow the rule.[26]

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Rule 404(b) case law are that the majority of the courts implicitly recognize the rule's association with character and that there are conflicting interpretations of other acts. In trying to interpret other acts without much guidance, each court has marched uniquely across Rule 404(b) issues").

[24] In *Dowling v. United States*, 493 U.S. 342, 361-62, (1990) (Brennan J., dissenting), Justice Brennan noted in dissent:

> "Whenever a defendant is forced to relitigate the facts underlying a prior offense for which he has been acquitted, there is a risk that the jury erroneously will decide that he is guilty of that offense. That risk is heightened because the jury is required to conclude that the defendant committed the prior offense only by a preponderance of the evidence. Cf. *In re Winship*, 397 U.S. 358, 363 (1970) (reasonable-doubt standard 'is a prime instrument for reducing the risk of convictions resting on factual error'). The fact that the prior offense is used as evidence of the presently charged offense raises concerns about the reliability of the jury's ultimate conclusion that the defendant committed the presently charged offense. These concerns stem in large part from the inherent danger of evidence relating to an extrinsic criminal offense."

[25] See Rodriguez, Note 6, *supra*, 48 U. Miami L. Rev. at 456.

[26] Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 Rev. Litig. 181, 190-195 (1998): (Limiting instructions are impossible

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The Constitutional concerns raised by Rule 404(b) include issues of procedural and substantive due process and double jeopardy concerns. The procedural due process issues primarily involve the question of notice. While the current rule provides for notice, that notice is dependent upon a request by the Defendant and is amorphous in nature, requiring only "reasonable notice" and production of the "general nature" of the evidence to be proffered. As a result, and, not surprisingly, issues of variance and constructive amendment frequently arise in cases where 404(b) evidence is introduced.

A. THE INTRODUCTION OF EVIDENCE OF OTHER CRIMES, WRONGS AND ACTS VIOLATES THE RIGHTS OF DEFENDANTS TO SUBSTANTIVE DUE PROCESS AND CREATES TRIALS THAT ARE FUNDAMENTALLY UNFAIR

A critical issue presented by the introduction of evidence of other crimes, wrongs and acts pursuant to the modern jurisprudence of Fed.R.Evid. 404(b) is that it is impossible to know whether limiting instructions actually work to prevent the jury from considering such evidence for the reasons prohibited by Rule 404(a) — as evidence of a defendant's bad character. This undermines our ability to rely on the jury's verdict as having resulted from proof beyond a reasonable doubt from evidence presented regarding the crimes charged.[27] This undercuts our faith that a jury's verdict is "honest."[28]

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for juries to follow because the prior offense only demonstrates the requisite intent if one assumes that the defendant has the continuing bad character to repeat the wrong deed; jury instructions attempting to limit 404(b) evidence are so ineffectual because most contain an inherent contradiction. The admission of evidence 404(b) evidence to prove "intent" is just a camouflaged propensity argument).

[27] See Note 22, *Old Chief, supra.* 519 U.S. at 180; see also Thomas M. DiBaggio, *Essay: Intrinsic And Extrinsic Evidence In Federal Criminal Trials: Is The Admission Of Collateral Other-Crimes Evidence*

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The introduction of such evidence also constitutes an assault on the presumption of innocence.[29] In criminal cases, it is well settled that due process requires that the accused be acquitted

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Disconnected To The Fundamental Right To A Fair Trial, 47 Syracuse L. Rev. 1229 (1997) (at the time of the writing, the author was an Assistant United States Attorney for the District of Maryland), notes 28 and 31.

[28] See, DiBaggio, *supra* , Note 27, at 1234-31:

> "Collateral evidence of a defendant's prior or subsequent criminal activity brings the jury to the margin and, thus, may lure it into declaring guilt on a ground different from the evidence that the defendant committed the charged offense. Such evidence distracts the jury from their fact finding responsibilities. It also creates a strong possibility that a jury will punish a defendant for criminal acts other than those charged. Or at least, that the jury will return a preventive conviction - meaning that it will convict a defendant when unsure of guilt because it is convinced that a defendant is a 'bad man' deserving of punishment. This danger is particularly great when the other-crimes evidence was not the subject of a conviction. In that case, the jury may believe that a defendant should be punished for the charged offense even if he is not guilty. A verdict that is the result of any of these actions is unfair and dishonest." (Footnotes omitted).

[29] In *People v. Molineux*, 61 N.E. 286, 293-94 (N.Y. 1901), the Court wrote:

> "This [no propensity evidence] rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of Magna Carta. It is the product of that same humane and enlightened public spirit which, speaking through our common law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proven guilty beyond a reasonable doubt."

See also sources cited at note 52, *infra.*

unless the state can prove the defendant's factual and legal guilt "beyond a reasonable doubt." *In re Winship*, 397 U.S. 358, 361 (1970); *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986). Even if one assumes that the admission of other-misconduct evidence does not shift the entire burden of proof from the state to the defendant by undermining the presumption of innocence, the admission of such evidence invariably lowers the state's burden of persuasion. Every trial lawyer knows from personal experience what a sea change occurs in a jury's attitude toward the accused's case even when other-misconduct evidence is legitimately admitted for a non-propensity purpose.

In *Spencer v. State of Texas*, 385 U.S. 554, 576 (1967), Chief Justice Warren noted in dissent: that "recognition to the prejudicial effect of prior-convictions evidence has traditionally been related to the requirement of our criminal law that the State prove beyond a reasonable doubt the commission of a specific criminal act." Almost 25 years later, Justice O'Connor echoed Chief Justice Warren's concerns about the jury's misuse of propensity evidence. In response to a jury instruction that involved evidence of prior crimes, Justice O'Connor observed in *Estelle v. McGuire*, 502 U.S. 62, 76 (1991) that this language may "relieve[] the State of its burden of proving the identity of [the] murderer beyond a reasonable doubt."

The fact of the matter is that the modern jurisprudence of this rule has so far departed from its historical roots as to constitute a deprivation of substantive due process. The modern practice has lost its grounding in the "fundamental conceptions of justice which lie at the base of our civil and political institutions" *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), at least insofar as they were conceived at the time the Fifth Amendment was drafted.

Further, the admission of such evidence raises additional serious and fundamental substantive due process issues. Specifically, the failure to require preliminary findings by the trial court that the act occurred by clear and convincing

evidence,[30] or to make any preliminary findings prior to the admission of such evidence, and concerns about notice, undermine the constitutional safeguards of procedural and substantive due process, the requirement that convictions be obtained by proof beyond a reasonable doubt only, and the presumption of innocence. All of these concerns together raise serious issues of fundamental fairness.[31] [32] Fundamentally, using

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[30] See, Argument III, *infra*, and see, *United States v. Huddleston*, 485 U.S. 681, 691 (1988) and its progeny. In *Huddleston*, The Supreme Court provided a four-step framework for determining the admissibility of other acts evidence:

> "First, the Court mandated that the evidence be offered for a proper purpose under Rule 404(b); second, the Court announced the relevancy requirement of Rule 402, as enforced through Rule 104(b); third, the Court instructed trial courts to determine whether the potential for unfair prejudice under Rule 403 substantially outweighs the probative value of the extrinsic evidence; and fourth, the Court required the trial judge, upon request, to instruct the jury, under Rule 105, that the other acts evidence must be considered only for the purpose for which it was offered."

[31] See DiBaggio, *supra* Note 27, 47 Syracuse L. Rev. at 1230-35, (1997):

> "The full admission of extrinsic other-crimes evidence is disconnected to two fundamental rights. First, that a defendant be afforded a fair opportunity to present a defense to the charged offense. Second, that a defendant's conviction result from an honest verdict - that is, the jury's dispassionate evaluation of the quality of the evidence indicating that he committed the charged offense . . .

and later he continues:

> "The introduction of virtually all prior or subsequent extrinsic criminal acts has now become the staple in federal prosecutions . . . The impact of the prejudice is virtually impossible to reverse once the evidence has been presented to the jury. In particular, it is a complete fiction that cautioning the jury not to infer guilt in the charged offense from the evidence of prior or subsequent similar criminal

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bad acts evidence to show intent and knowledge is tantamount to using it for the exact purpose for which its use is prohibited—to show propensity.

B. THE INTRODUCTION OF EVIDENCE OF OTHER CRIMES, WRONGS AND ACTS VIOLATES THE PROCEDURAL DUE PROCESS RIGHTS OF DEFENDANTS AND RAISES DOUBLE JEOPARDY CONCERNS

The admission of 404(b) evidence deprives the defendant of proper notice of the charges against him or her. Issues regarding variance between *allegata* and *probata* and constructive amendment frequently arise in cases where 404(b) evidence is admitted because that evidence is not part of the notice provided of the charges against the defendant. While notice is provided for in the rule, upon request by the defendant, the rule is constitutionally defective in not requiring notice whether requested or not. Further, the Rule provides only for notice of "the general nature of any such evidence it intends to introduce at trial," and failure to provide pre-trial notice can be excused by the Court on "good cause shown."

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> acts will sufficiently mitigate the prejudicial impact. In addition, reading the rule as an inclusive provision simply emasculates the general preclusion of other-crimes evidence under Rule 404(a). As a result, the "protections" currently in place are insufficient to afford a defendant a fair opportunity to defend against the charged offense and ensure an honest verdict. The protective lattice varies among the circuits."

Id. at 1239-1241 (footnotes omitted).

[32] See Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 Ohio St. L.J. 575 (1990) (characterizing the admissibility of uncharged misconduct evidence as the single most important issue in contemporary criminal evidence law). See also, David P. Leonard, *The Perilous Task of Rethinking the Character Evidence Ban*, 49 Hastings L.J. 835, 841 (1990).

The fact that the prosecution can introduce evidence of other crimes or wrongs which were the subject of an acquittal, also raises double jeopardy concerns,[33] as well as questions of fundamental fairness.

The very fact that such evidence is admissible to a standard less than beyond a reasonable doubt, but can then help form the basis for a verdict of guilty of the crime charged, creates an irreconcilable conflict with the requirement of proof beyond a reasonable doubt.[34]

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[33] See generally, Cynthia L. Randall, *Comment: Acquittals In Jeopardy: Criminal Collateral Estoppel And The Use Of Acquitted Act Evidence*, 141 U. Pa. L. Rev. 283 (1992) (critical of the Supreme Court's decision in *Dowling* for failing to protect defendants under the Double Jeopardy clause from the burden of relitigating conduct for which they have already been acquitted); and see, Miguel Manuel Delao, *Admissibility Of Prior Acquitted Crimes Under Rule 404(B): Why The Majority Should Adopt The Minority Rule* 16 Fla. St. U.L. Rev. 1033, 1041-51 (1989) (Using prior acquitted crimes to demonstrate guilt in the instant crime violates the Double Jeopardy Clause and violates fundamental fairness).

[34] See, Justice Brennan's dissent in *Dowling v. United States*, 493 U.S. 342, 361, (1989), FN 4:

> "The higher reasonable-doubt standard is employed in the criminal context to ensure the accuracy of convictions and thereby protect defendants, not to permit introduction of evidence of crimes for which the defendant has been acquitted. *In re Winship*, 397 U.S. 358, 363 (1970). By definition, when the Government fails to prove a defendant guilty beyond a reasonable doubt, the defendant is considered legally innocent. Unlike the majority of the Court, I believe that at least with respect to subsequent criminal prosecutions, "the acquitted defendant is to be treated as innocent and in the interests of fairness and finality made no more to answer for his alleged crime." *State v. Wakefield*, 278 N.W.2d 307, 308 (Minn.1979). It is ironic that Movant would have been better off, in his second trial, if he had not been represented by counsel at the first trial and had been convicted because uncounseled

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This issue is one of great importance, not just in the federal courts, but also in the courts of most states. Codes of evidence as well as the common law decisions on evidentiary issues in the states often follow the guidance and trends in the Federal Rules and the case law interpreting them.

As Justice Scalia noted in *Crawford v. Washington*, 541 U.S. 36, 67- 68, (2004), "By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design." *Crawford* teaches that no rule of evidence, no matter how long standing or well accepted, can trump the requirements of the Constitution. Fed.R.Evid. 404(b) is unconstitutional, at least as it applies to extrinsic evidence proffered to prove intent. *Crawford* is also instructive because in ascertaining the meaning of the confrontation clause and interpreting the hearsay rule, Justice Scalia makes a detailed examination of the history that evidentiary rule to determine the meaning of the confrontation clause at the time it was drafted. In this case, it is necessary to examine the history of the character rule in understanding what Due Process required in terms of a fair trial, at the time the Bill of Rights was adopted.[35]

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> convictions may not be used in any capacity in subsequent trials. See *Loper v. Beto*, 405 U.S. 473, 483, (1972) (impeachment); *United States v. Tucker*, 404 U.S. 443, 447, (1972) (sentencing enhancement); *Burgett v. Texas*, 389 U.S. 109, (1967) (substantive evidence)."

See also sources cited at note 52, *infra.*

[35] The history of the exclusion of character evidence of other crimes, wrongs and acts dates back more than three centuries to the English Common Law. See Edward J. Imwinkelried, *Where There's Smoke, There's Fire": Should The Judge Or The Jury Decide The Question Of Whether The Accused Committed An Alleged Uncharged Crime Proffered Under Federal Rule Of Evidence 404?* 42 St. Louis L.J. 813, 828 (1998) ("The uncharged misconduct doctrine has an ancient lineage. Legal historians have traced the doctrine back more than three centuries." [footnotes omitted]; and see, Dibaggio, *supra,* Note 27, 47 Syracuse L. Rev. (1998) at 1232-1234: ("The concern over the admission of other-crimes evidence is also deeply rooted in the common law . . .

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Over the years the use of 404(b) evidence has grown significantly. As it has done so, Rule 404(b) has departed from its historical grounding;[36] whereas the rule originally was designed and intended to be a rule of exclusion, it has now become a rule of inclusion.[37] The safeguards of the Rule 403

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Fundamental to our system of justice is that a criminal trial not be conducted in a manner that undermines the public confidence in the fairness of the process"). See also, *People v. Molineux, supra,* Note 29. And in *Michelson v. United States*, 335 U.S. 469, 475-76 (1948), for example, the Court wrote:

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt.FN7 Not that the law invests the defendant with a presumption of good character, *Greer v. United States*, 245 U.S. 559, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime.FN8 The inquiry is not rejected because character is irrelevant; FN9 on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance 219 tends to prevent confusion of issues, unfair surprise and undue prejudice.FN10" [Footnotes omitted]

[36] For a good discussion of the history of the rule generally, see Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble With Rule 404(b)*, 78 Temp. L. Rev. 201 (2005); and see, David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 Ind. L.J. 1161 (1998).

[37] Rule 404(b) has been widely characterized as an inclusionary rule among the circuits. See, e.g., *United States v. Moore,* 98 F.3d 347,
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balancing test,[38] Rule 401 relevance test, Rule 402, limiting instructions[39]under Rule 105, and the requirement of a finding of "sufficient evidence prior to admission" under Rule 104,[40] all of which were designed to prevent the misuse by prosecutors and by juries of 404(b) other acts evidence, have proven wholly inadequate in practice. The application of the rule has been

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349-50 (8th Cir. 1996); *United States v. Jemal*, 26 F.3d 1267, 1272 (3rd Cir. 1994); *United States v. Aramony*, 88 F.3d 1369, 1377 (4th Cir. 1996); *United States v. Garcia*, 291 F.3d 127, 136 (2d Cir. 2002). And see DiBaggio, *supra* Note 11 at 1239 (1997) ("The introduction of virtually all prior or subsequent extrinsic criminal acts has now become the staple of federal prosecutions").

[38] See, Note 22, *supra,* Justice Souter defining "unfair prejudice" in *Old Chief*, 519 U.S. at 180.

[39] It is impossible to determine whether the use of limiting instructions to the jury actually serves the purpose of prohibiting the jury from considering the evidence for improper purposes but empirical evidence suggests otherwise. Other acts evidence is equally, and perhaps even more damaging. See, for example, *United States v. Crowder*, 87 F.3d 1405, 1415 (D.C. Cir. 1996) (noting that "the ability of a limiting instruction to overcome the prejudicial effects of bad acts evidence can be . . . an 'unmitigated fiction'"); and see Sharon Wolf & David A. Montgomery, *Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Judgment of Mock Jurors*, 7 J. Applied Soc. Psychol., 216, 216-18 (1977) (concluding that a limiting instruction actually increases biasing effects). This is somewhat analogous to the problem of co-conspirator confessions which the Court addressed in *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (stating "the naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."), and see *Bruton v. United States*, 391 U.S. 123, 129 and 136-37 (1968).

[40] See *Huddleston v. United States, supra*, Note 30. (This standard of proof is supplied by Rule 104(b): "Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition").

uneven and inconsistent, and the rule has been the subject of tremendous volumes of litigation,[41] none of which has served to clarify its application in practice or worked to prevent the substantial injustices which occur from the routine introduction of such evidence. All of these reasons taken together require the intervention of the Supreme Court of the United States.[42]

This appears to be an issue of first impression. It is also an issue of great importance, one that the Supreme Court should take the opportunity to decide as the criticism of Rule 404(b) and the litigation ensuing from the ever increasing use of the rule by prosecutors grows.[43]

III. HUDDLESTON WAS WRONGLY DECIDED, OR IN THE ALTERNATIVE, REQUIRES SIGNIFICANT MODIFICATION AND CLARIFICATION

It has been nearly 20 years since this Court's decision in *Huddleston v. United States*, 485 U.S. 681 (1988). The decision has been widely criticized by scholars, the State Courts,[44] and

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[41] See Reed, *supra*, Note 36, 78 Temp. L. Rev. at 211 ("Since 1975, Rule 404(b) has been the most contested Federal Rule of Evidence. It has been cited in 5,603 federal trial and appellate decisions since adoption. No other evidentiary rule comes close to this rule as a breeder of issues for appeals").

[42] Miguel Manuel Delao, *Comment: Admissibility Of Prior Acquitted Crimes Under Rule 404(b): Why The Majority Should Adopt The Minority Rule*, 16 Fla. St. U.L. Rev. 1033 (1989) (Admitting evidence to prove an issue previously litigated and necessarily decided for the defendant in a prior prosecution is an affront to the underlying philosophy of our criminal justice system. Admission of such evidence violates the double jeopardy clause, the due process clause, and the relevancy requirement of the Federal Rules of Evidence).

[43] And see references cited *supra* at Notes 3, 4 and 41.

[44] For a list of States that have adopted a clear and convincing standard, or a preponderance of the evidence standard, see *Arizona v. Terrazas*, 189 Ariz. 580, 583-84 (1997). Also see, Imwinkelried, *supra*, Note 35, 42 St. Louis L.J at 831-32 ("[I]n contrast to the generally enthusiastic state court response to Supreme Court decisions such as *Dowling* and *Estelle*, the state court response to *Huddleston* has been sharply negative").

the A.B.A.[45] Further, the Circuit Courts of Appeals are far from uniform in following the dictates of *Huddleston*.[46]

In light of that practical experience, it has become clear that *Huddleston* was wrongly decided, or, in the alternative, that clarification and refinement is now necessary to address the issues that have arisen in practice since the decision was handed down.[47] Post-*Huddleston* experience shows that the four-

[45] In January, 1989, the American Bar Association passed a resolution disapproving the result in *Huddleston*. See 3 BNA Criminal Practice Manual 75 (Feb. 22, 1989) (recommending that "1. Questions of preliminary fact regarding the admissibility of evidence of extrinsic act will be determined as a precondition by the court; and 2. The existence of any preliminary fact required as a precondition to the admissibility of evidence of the extrinsic act must be demonstrated by clear and convincing evidence") See also, Abraham P. Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 Emory L.J. 135 (1989) (calling for legislative amendment to overturn the result in *Huddleston*).

[46] Victoria B. Lutz, *Tenth Circuit Survey: Balanced Evidence: Discretion of the Gatekeeper to Admit Prior Convictions and Acts*, 77 Denv. U.L. Rev. 507, 515 (2000) ("Although the circuit courts widely recognize the U.S. Supreme Court holding in *Huddleston*, many circuits chose to supplement their existing 404(b) tests with that holding").

[47] As one noted scholarly commentator on evidence issues noted:

> ". . . realism demands that we recognize limits to our faith in the capacity of the lay jury. When the prosecution offers testimony...about multiple, uncharged acts similar to the charged offense, it exceeds the jury's ability to determine the preliminary fact of the accused's identity. .. even if the jury finds insufficient evidence of the accused's commission of the uncharged "acts," the fact of multiple accusations may influence the jury's deliberation. The foundational testimony can trigger a powerful doctrine of chances inference that lingers even after the jury concludes that prosecution has not satisfied the statutory requirement for proof of full-fledged 'acts' perpetrated by the accused. Surely, a conviction should rest on something more substantial than 'the vilest proverb[,] 'Where there's smoke, there's fire.'""

Edward J. Imwinkelried, supra, Note 35, 42 St. Louis L.J. at, 845-46.

part test articulated in that case has proven inadequate and unworkable, and the protections of Federal Rules of Evidence 104, 105, 401, 403 and 404 have failed to safeguard basic and fundamental fairness, and do not comply with the requirements of due process. See Argument II, *supra.*

The *Huddleston* Court decided that the Rules of Evidence do not require the Court to make a preliminary determination as to the occurrence of other crimes, wrongs and acts. That decision was premised on a reading of those Rules and did not consider the question of whether the current procedure violates the Due Process protections of the Constitution. However, it is respectfully submitted that this Court needs to consider concerns of fundamental fairness that are raised by the current evidentiary standards; Due Process requires more.

Permitting the jury to hear such evidence, conditioned on a finding that there is sufficient evidence that the acts occurred, creates a number of problems. First, there is the problem of unringing the bell—once the jury has heard such evidence, how can they possibly ignore it?[48] In other words, we cannot expect the jury to ignore the elephant in the room.[49] If such evidence comes in conditioned on a later finding, the damage done by

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[48] As Justice Robert Jackson, U.S. Supreme Court noted in *Krulewitch v. United States,* 336 U.S. 440, 453 (1949) (Jackson, J., concurring) "The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction."

[49] Josephine Ross, *"He Looks Guilty": Reforming Good Character Evidence To Undercut The Presumption Of Guilt,* 65 U. Pitt. L. Rev. 227, 251-52 (2004) ("There is general skepticism among defense attorneys and scholars that juries can disregard the bad character aspect of bad acts, once bad acts of the defendant are introduced against the accused for any reason, regardless of whether a judge gives limiting instructions"*);* and see *Nash v. United States,* 54 F.2d 1006, 1007 (2d Cir. 1932*)* (Judge Learned Hand described limiting instructions as "the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else"); see also sources cited at Note 39, *supra.*

such evidence, if the later finding doesn't occur, cannot realistically be undone. Thus, there is a concern for judicial economy—rather than risk a mistrial, the judge should act as gatekeeper for this evidence. In fact, judicial economy dictates that we avoid "mini-trials" on issues other than those directly material to the crimes charged, and the growth of the use and misuse of evidence of other crimes, wrongs and acts under Rule 404(b) already places a substantial burden on the trial courts.

If we are to permit the introduction of such evidence, it is necessary to provide additional safeguards to ensure that trials comport with the requirements of Due Process. One such safeguard would be requiring the jury to make specific findings prior to considering such evidence, and requiring them to articulate those findings on special interrogatories or special verdict forms.[50] Such a procedure necessarily would require clear jury instructions instructing jurors to consider such evidence for such limited purposes only *after* making the requisite findings on special interrogatories. Another alternative would be to use bifurcated jury proceedings.[51]

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[50] Cynthia Randall, Comment: *Acquittals In Jeopardy: Criminal Collateral Estoppel And The Use Of Acquitted Act Evidence*, 41 U. Pa. L. Rev. 283 (1992) (Critical of the Court's failure to incorporate collateral estoppel principles into double jeopardy jurisprudence in *Dowling*; noting the problems of interpreting general verdicts and recommending that special interrogatories be used); See also Kate H. Nepveu , *Beyond "Guilty" or "Not Guilty": Giving Special Verdicts in Criminal Jury Trials* 21 Yale L. & Pol'y Rev. 263 (2003) (reviewing the increasing use of special interrogatories and special verdict forms in federal criminal cases; noting that this practice can assist juries in their deliberations and are a useful tool in facilitating informed appellate review).

[51] Bifurcation is used in a number of instances in criminal trials, including for the use of finding predicate acts in RICO case. See, for example, Susan W. Callan, *Symposium: Entire Controversy Doctrine: Note: Inherent Prejudice Of A "Felon-In-Possession" Of A Firearm Trial: Bifurcation, Stipulation, And Jury Instruction As Effective But Judicially Rejected Remedies*, 28 Rutgers L. J. 201 (1996); and see, Nepveu, 21 Yale L. & Pol'y Rev. 263, *supra*, Note 50.

As discussed in Argument II A, *supra*, the admission of evidence of other crimes, wrongs and acts under Rule 404(b) constitutes an assault on the presumption of innocence.[52] The A.B.A passed a resolution in January 1989 criticizing *Huddleston* and calling for a clear and convincing standard.[53]

Because of the profound implications of this rule, and nearly two decades of problematic experience since *Huddleston* was decided, this Court should grant review and reconsider its decision in *Huddleston*, or in the alternative, should modify and clarify the decision.

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[52] See, for example, Harvard Law Review, *Winship On Rough Waters: The Erosion Of The Reasonable Doubt Standard*, 106 Harv. L.R. 1093, 1105 (1993) and sources cited therein. ("[The erosion] of *Winship* [is] not [a] mere theoretical possibilit[y]. Empirical evidence suggests that the admission of evidence of uncharged misconduct can have a strong impact on the reliability of a jury's determination of guilt. Many scholars have concluded that "evidence of uncharged misconduct poses a grave likelihood of prejudice" and a significant risk of an erroneous conviction. This risk of unfair prejudice from the use of uncharged misconduct is particularly threatening to *Winship* because the Supreme Court has required only a minima[l] showing of a link between the defendant and some past misconduct." [footnotes omitted]). See also, Notes 27-29, *supra*. And see, Rodriguez, *supra*, Note 6, 48 U. Miami L. Rev. at 478 ("The introduction of highly prejudicial extrinsic acts evidence that fails to meet the clear and convincing standard of proof denies a defendant the right to a fair trial").

[53] See Note 45, *supra*.

CONCLUSION

For all the foregoing reasons, the petitioner respectfully requests that the Supreme Court grant review of the important issues presented in this matter.

Respectfully submitted,

STANFORD SHMUKLER*
JOEL M. SHMUKLER
105 Cheswold Court
Wayne, PA 19087
(610) 647-2058

BERNARD L. SIEGEL
Counsel of Record
1515 Market Street
Suite 1915
Philadelphia, PA 19102
(215) 751-9830

Counsel for Petitioner

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* Stanford Shmukler, Esquire, a member of the Bar of this Court, passed away during the final stages of the preparation of this Petition.

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED APRIL 10, 2006

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 05-2460

UNITED STATES OF AMERICA

v.

DOROTHEA DARAIO,

Appellant.

Argued March 6, 2006

Before ROTH and GREENBERG, *Circuit Judges*, and BUCKWALTER, *District Judge*.*

(Filed: April 10, 2006)

OPINION OF THE COURT

GREENBERG, *Circuit Judge*.

I. INTRODUCTION

Defendant Dorothea Daraio ("Daraio") appeals from a judgment of conviction and sentence entered on May 5, 2005,

* Honorable Ronald L. Buckwalter, Senior Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

in this tax evasion case. Daraio raises three issues on this appeal. First, she argues that the evidence at trial coupled with the jury instructions constructively amended the indictment returned against her on which she was tried. Second, she contends that there was at trial, in the alternative to a constructive amendment of the indictment, a prejudicial variance in the evidence from the terms of the indictment. In these two contentions Daraio asserts that the government's proofs may have led the jury to convict her of unlawful conduct the indictment did not charge. Third, Daraio argues that the district court erred in admitting evidence under Federal Rule of Evidence 404(b) ("Rule 404(b) evidence") of her prior non-compliance with federal tax laws to prove her intent to commit the crime charged in this case. Daraio contends that by reason of any of these errors she is entitled to an outright reversal of her conviction or at least a new trial. For the reasons set forth below, we will affirm.

II. FACTS AND PROCEDURAL HISTORY

On August 17, 2004, a grand jury returned a superseding indictment charging Daraio with one count of tax evasion in violation of 26 U.S.C. § 7201 and 18 U.S.C. § 2.[1] In particular, the indictment charged Daraio with "knowingly and willfully attempt[ing] to evade and defeat the payment

1. The superseding indictment differed from the original indictment only inasmuch as it expanded the period included in the charged offense from "the calendar year 1998," J.A. at 594, to "the quarterly periods that included April 1994 through April 1998." J.A. at 598. In these circumstances we refer to the superseding indictment as the "indictment." In this opinion we refer to the parties' original joint appendix as J.A. and to their joint supplemental appendix as Supp.App.

of a substantial part of the payroll taxes due and owing by Eagle Security, Inc.[2] to the United States for the quarterly periods that included April 1994 through April 1998, in the amount of approximately $222,607.40, by directing clients of Eagle Security, Inc. to pay their unpaid balances that they owed to Eagle Security, Inc. to E.S.S. Co." J.A. at 598. The indictment charged that Daraio gave those directions after or at about the time that the Internal Revenue Service ("IRS") issued levies on ten clients of Eagle Security, Inc. ("Eagle Security") requiring them to pay their balances due to Eagle Security to the IRS. The government produced evidence at the trial supporting the indictment which we need not describe at length.[3]

Before the start of the presentation of evidence at the trial, the prosecutor in *in limine* proceedings filed and served a notice that the government would seek to introduce evidence of Daraio's prior tax non-compliance as demonstrated by her personal tax records and tax records from several corporations with which she was involved pursuant to Rule 404(b). The government sought to introduce this evidence on the theory that, as the district court recognized, "general feelings or general attitude toward the IRS can be proof of willingness or intent." J.A. at 109-10. The Rule 404(b) evidence ultimately included the following items:

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2. Eagle Security, Inc. provided security services and personnel to its clients.

3. We do not detail the evidence inasmuch as Daraio does not contend that the evidence supporting the verdict was inadequate.

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(1) Payroll tax records for Joseph Daraio, Daraio's husband,[4] trading as ESS-Co. and Quest Investigators, pertaining to tax periods from 1989-1993 including the records themselves, as well as, for certain tax periods, certifications of a "lack of records" indicating the failure to file tax returns;

(2) Certifications by the IRS that Eagle Security did not file payroll tax returns in 1990-1993 and 1999-2004;

(3) Payroll tax records, again including certifications of lack of records, for ESS-Co., beginning in the third quarter of 1998 through the first quarter of 2004;

(4) Certifications of lack of records for ESS-Co. from 1992-1998 and 2000-2004;

(5) Corporate tax records for Eagle Security from 1990-2003,[5] that showed that it had not filed forms with the IRS in 1999, 2001, and 2002;

(6) Corporate tax records for ESS-Co. from 1998-2003;

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4. The record is unclear as to the degree of Daraio's involvement in ESS-Co./Quest Investigators. ESS-Co. is a different entity than E.S.S. Co., and ESS-Co. is not the corporation that Daraio allegedly created for purposes of evading tax levies as charged in the indictment.

5. Corporate tax records cover a broader range of activities and provide more information than payroll tax records.

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(7) Joint personal income tax returns for Joseph Daraio and Daraio from 1984 and 1989-2003.

Over Daraio's continuing objection, the district court admitted the Rule 404(b) evidence, reasoning that evidence of past conduct is relevant when, as in this case, "the defendant has square[ly] raised intent."[6] J.A. at 23. The district court, however, gave the jury the following limiting instruction:

> Ladies and gentlemen of the jury, you will soon, and at various other times during the trial, hear evidence of acts the defendant-of acts of the defendant that may be similar to those charged in the indictment, but which were committed on other occasions.
>
> You must not consider any of this evidence in deciding if the defendant committed the acts charged in this indictment. However, you may consider this evidence for other very limited purposes.
>
> If you find beyond a reasonable doubt from other evidence in this case, that the defendant did commit the acts charged in the indictment, then you may consider the evidence of similar acts allegedly committed on other occasions, to

6. Although Daraio now asserts that "it is indisputable that intent . . . was never in issue at trial," Appellant's br. at 29, at a pre-trial hearing her attorney did not disagree with the court's statement that "intent is so much the heart of the case." J.A. at 23. *See infra* Part IV.B (discussing whether intent was at issue).

> determine, one, whether the defendant had the intent necessary to commit the crime charged in the indictment; two, whether the defendant had the motive to commit the act charged in the indictment; or, three, whether the defendant willfully committed the acts for which she is on trial, or rather committed them by accident, negligence, or mistake.

J.A. at 79-80.[7]

In addition to the admission of the *Rule 404(b)* evidence, Daraio takes issue with certain of the prosecutor's arguments and statements at trial. First, in the government's opening statement, the prosecutor identified Daraio as "a woman . . . who thumbed her nose at the IRS for more than a decade," J.A. at 37, and stated that "defendant failed to file her own personal income tax returns for the years 1996, 1997 and 1998." J.A. at 41. The prosecutor also explained the "long and numerous" attempts by the IRS to "get compliance from [Daraio]," J.A. at 41, as well as the "trust fund penalt[ies] that were assessed against [Daraio] from the mid 1980s." J.A. at 50-51. Moreover, the prosecutor contended that "this was not the first time that [Daraio] was involved in shutting down a company that amassed a huge payroll tax liability using a new company to continue the business, leaving out payroll tax liabilities behind." J.A. at 51.

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7. The court substantially repeated this limiting instruction several times during the trial.

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During the government's case-in-chief, the prosecutor elicited testimony that Daraio was a "pyramiding taxpayer," J.A. at 129, and elicited testimony concerning the seizure of her residence. The prosecutor also stated:

> After 20 years of snubbing the IRS, or doing absolutely everything in her powers to avoid paying her personal corporate and payroll taxes, the defendant is sitting here in this courtroom telling all of you that now she is a champion for the rights of the IRS.
>
> . . . .
>
> The defendant's attitude toward the IRS in paying taxes in general is another indication of willfulness. At every turn the defendant was refusing to become compliant with the IRS. She has shown complete and utter disregard for the IRS in her duty to pay taxes. She says thinks [sic] this she can essentially life [sic] tax free life for the past 20 some years not paying the payroll tax liability for at least three corporations, working her finances so that she pays not more than six dollars of individual income taxes in the same year that she takes $108,000 of horse expenses, not even filing individual income tax returns for three years, and not filing corporate income tax returns since 1993.

J.A. at 416-17.

The prosecutor argued that "[w]e are here for one reason only; that is because the defendant, Dorothea Daraio, is a tax cheat. She has done everything in her power for the last 20 years to live essentially a tax-free life." J.A. at 418. The prosecutor then described Daraio's assets, including her home and her racehorses, and suggested to the jury that Daraio should have sold her home or her racehorses to "pay the IRS what she owes." J.A. at 419-20. Finally, the prosecutor emphasized that from 1994 to 2002, "she could have been compliant . . . [but] she chose not to." J.A. at 454. The prosecutor added that her non-compliance "is why we are here today." J.A. at 454. The prosecutor then asked the jury, "how long is it reasonable for the IRS to wait for this woman to finally decide to get compliant[?]" J.A. at 454.

Much of the defense strategy focused on Daraio's assertion that she "had nothing to do with the preparation of th[e] invoices" asking Eagle Security's clients to make their payments to E.S.S. Co. *See, e.g.*, J.A. at 325-26 (Daraio's denial of preparing invoices or directing employees to prepare the invoices requesting Eagle Security's clients to pay E.S.S. Co.). For example, Cheryl Daraio, Daraio's daughter, an employee at Eagle Security, testified that she mistakenly prepared the duplicate invoices directing Eagle Security's clients to pay E.S.S. Co. instead of Eagle Security. Cheryl testified that she prepared the false invoices, but denied that Daraio directed her to prepare or send the invoices, or even knew about them.

In its final charge, the district court instructed the jury that, "[t]o find defendant guilty[,] . . . you must find that the defendant . . . took an affirmative act or acts in an attempt to

evade or defeat this tax as described in the indictment . . . ," J.A. at 546, and explained the three elements of tax evasion under 26 U.S.C. § 7201:(1) willfulness; (2) existence of a tax deficiency; and (3) an affirmative act constituting an evasion or an attempted evasion of the tax. The court then reminded the jury to consider the evidence of prior non-compliance "solely for the limited purpose of deciding, one, whether the defendant had the intent necessary to commit the crime charged in the indictment; whether the defendant had the motive to commit the crime charged [in] the indictment; and whether the defendant committed the acts for which she is on trial, by accident or mistake." J.A. at 551-52. The court told the jury that "the Government must show more than the mere failure to do something, such as the failure to pay taxes which are due." J.A. at 548. The court also read to the jury paragraph nine of the indictment, which contained the charged offense. Finally, the court stated that the "evidence of actions which relate to the failure to comply with laws involving the payment of taxes or the filing of returns . . . are not charged in the indictment." J.A. at 551.

After the court charged the jury it gave Daraio an opportunity to object to the charge but she expressly declined to do so. After the jury returned a guilty verdict and Daraio unsuccessfully moved for (1) a judgment of acquittal, (2) a directed verdict, or (3) a new trial, the court sentenced her to a 41-month custodial term to be followed by a three-year term of supervised release. Daraio then filed a timely notice of appeal.

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III. JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction under 18 U.S.C. § 3231. *See United States v. Isenhower*, 754 F.2d 489, 490 (3d Cir.1985), and we have jurisdiction under 28 U.S.C. § 1291. *See United States v. Gambone*, 314 F.3d 163, 169 (3d Cir.2003).

We exercise plenary review in determining whether there was a constructive amendment of the indictment and whether there was a variance between the indictment and the proofs at trial. *See United States v. Prince*, 214 F.3d 740, 756 (6th Cir.2000). However, inasmuch as Daraio did not raise the constructive amendment and variance arguments in the district court we would consider them on a plain error basis with respect to granting relief if there was an error on either basis. *See United States v. Syme*, 276 F.3d 131, 148 (3d Cir.2002). ("[Defendant] did not raise this argument [regarding constructive amendment] in the District Court and we therefore apply the plain error standard of review."). To the extent that our review of the district court's *Rule 404(b)* ruling requires us to interpret the rules of evidence our review is plenary, but, if the evidence could have been admissible in some circumstances, we would review the district court's decision to admit evidence of prior "bad acts" under *Rule 404(b)* for an abuse of discretion. *United States v. Givan*, 320 F.3d 452, 460 (3d Cir.2003).

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IV. DISCUSSION

A. *Variations Between Indictment and Proofs*

There are two types of variations between the charges in an indictment and the evidence at trial: (1) amendments of the indictment when its charging terms are altered; and (2) variances, where the charging terms of the indictment are not changed but when the evidence at the trial proves facts materially different from those alleged in the indictment. *United States v. Castro*, 776 F.2d 1118, 1121 (3d Cir.1985). Daraio argues that the evidence adduced at trial coupled with the jury instructions constructively amended the indictment. In this regard Daraio argues that the prosecutor improperly introduced evidence of her repeated failure to withhold payroll taxes, which prejudiced her substantial rights, and suggested that her failure to withhold the proper amounts was a charged crime. Thus, Daraio asserts that the government "tried her not for the indicted crime of interfering with levies, but rather the crime of failing to pay the payroll taxes in the first place, as well as a variety of other wrongs." Appellant's br. at 13.

In the alternative, Daraio argues that the proofs adduced at trial varied from the allegations in the indictment to such a degree that they constituted a prejudicial variance from the indictment. Specifically, she argues that "[w]here the language of the indictment limits the crime charged to diversion of receivables in an effort to defeat IRS levies, trial on the issue of willful failure to withhold the proper amount in the first instance created a prejudicial variance between indictment and proof." Appellant's br. at 24-25 (footnote omitted).

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1. Constructive Amendment

An indictment is constructively amended when, in the absence of a formal amendment, the evidence and jury instructions at trial modify essential terms of the charged offense in such a way that there is a substantial likelihood that the jury may have convicted the defendant for an offense differing from the offense the indictment returned by the grand jury actually charged.[8] *See United States v. Miller*, 471 U.S. 130, 140, 105 S.Ct. 1811, 1817, 85 L.Ed.2d 99 (1985) (constructive amendment occurs when defendant is deprived of "substantial right to be tried only on charges presented in an indictment returned by a grand jury") (quoting *Stirone v. United States*, 361 U.S. 212, 217, 80 S.Ct. 270, 273, 4 L.Ed.2d 252 (1960)); *see also United States v. Floresca*, 38 F.3d 706, 710 (4th Cir.1994) (There is "[a] constructive amendment to an indictment . . . when either the government (usually during its presentation of evidence and/or its argument), the court (usually through its instructions to the jury), or both, broadens the possible bases for conviction beyond those presented by the grand jury."). Thus, "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Stirone*, 361 U.S. at 217, 80 S.Ct. at 273. "The key inquiry is whether the defendant was convicted of the same conduct for which he was indicted." *United States v. Robles-Vertiz*, 155 F.3d 725, 729 (5th Cir.1998). Constructive amendments "are *per se* reversible under harmless error review, [and] are presumptively prejudicial under plain error review." *Syme*, 276 F.3d at 136.

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8. We are not concerned here with a claim that there was an actual amendment of the indictment by a literal change of its terms.

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In *Stirone*, the indictment alleged that the defendant through extortion unlawfully interfered with interstate commerce in the importing of sand into Pennsylvania. Nevertheless, the evidence showed not only importation of sand, but also exportation of steel from Pennsylvania. Moreover, the district court charged the jury that the defendant's guilt could rest on the effect of his conduct on interstate commerce with respect to either sand or steel. 361 U.S. at 214, 80 S.Ct. at 272. The Supreme Court held that this charge coupled with the evidence adduced at trial created an unconstitutional variance between the indictment and the proof, which "destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury." *Id.* at 217, 80 S.Ct. at 273; *see also United States v. Wozniak*, 126 F.3d 105, 110-11 (2d Cir.1997) (constructive amendment when district court charged jury on evidence relating to marijuana transactions but indictment alleged only cocaine and methamphetamine transactions).

In this case, the indictment specifically charged that Daraio "knowingly and willfully attempt[ed] to evade and defeat the payment of . . . the payroll taxes due . . . by directing clients of Eagle Security, Inc. to pay their unpaid balances that they owed to Eagles Security, Inc. to E.S.S. Co." J.A. at 598. Although we agree with Daraio that the government presented a significant amount of evidence concerning her prior tax non-compliance beyond that charged in the indictment, the district court's instructions ensured that the jury would convict her, if at all, for a crime based on conduct charged in the indictment.

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In reaching our conclusion we rely on our case law recognizing that "it is a basic tenet of our jurisprudence that a jury is presumed to have followed the instructions the court gave it." *Givan*, 320 F.3d at 462 (citing *United States v. Gilsenan*, 949 F.2d 90, 96 (3d Cir.1991)). In this case, the district court thoroughly and accurately instructed the jury on the basic elements of tax evasion and focused the jury's attention on the conduct that the indictment charged. For example, the court told the jury that, although it "heard evidence of actions which relate to the failure to comply with law involving the payment of taxes or the filing of tax returns, [these acts] are not charged in the indictment." J.A. at 551. The district court also told the jury that "the [g]overnment must show more than the mere failure to do something, such as the failure to pay taxes which are due and owing." J.A. at 548. Moreover, the court supplied the jury with a copy of the indictment for its use during its deliberations. Therefore, the district court obviated the possibility of the indictment being constructively amended by issuing accurate and thorough jury instructions precluding the jury from convicting Daraio for any conduct other than that which the indictment charged.

We also reject Daraio's argument that "the possibility of [a conviction based on] multiple affirmative acts permeated the trial court's instructions." Reply br. at 10. We do not find that the district court's reference to Daraio's "affirmative acts" in a plural sense somehow constructively amended the indictment. Indeed, it was appropriate for the district court to refer to multiple affirmative acts to reflect the charge that Daraio directed "clients" to pay moneys due to Eagle Security to E.S.S. Co. Overall we are satisfied from our examination

of the jury instructions as a whole that the district court properly focused the jury on Daraio's conduct as charged in the indictment by repeatedly instructing the jury to confine its consideration of the *Rule 404(b)* evidence to its proper purpose. Accordingly, we hold that the government's proofs coupled with the district court's instructions did not constructively amend the indictment.[9]

2. Prejudicial Variance

We similarly conclude that the government's proofs and the district court's instructions did not create a prejudicial variance prejudicing Daraio's substantial rights. Initially on the variance point we recognize that "[t]he line between a constructive amendment and a variance is at times difficult to draw." *United States v. Adamson*, 291 F.3d 606, 615 (9th Cir.2002). There is a variance "where the charging terms [of the indictment] are unchanged, but the evidence at trial proves facts materially different from those alleged in the indictment." *Castro*, 776 F.2d at 1121. When there has not been a constructive amendment of the indictment but rather there only has been a variance between the facts alleged in the indictment and the evidence offered at trial, the proceedings at the trial will not have usurped the

9. In its brief the government indicates that Daraio's "constructive amendment argument might also be read as an assertion that the Government's remarks prejudiced her ability to receive a fair trial." Appellee's br. at 22. We note, however, that Daraio's brief does not have a separate section dealing with a possible unfair argument issue and thus we regard her comments about the government's arguments as being subsumed in her constructive amendment and variance arguments.

constitutionally guaranteed role of the grand jury. Instead, the concerns raised by a variance argument are the fairness of the trial and the protection of the defendant's right to notice of the charges against her and her opportunity to be heard. *See, e.g., Kotteakos v. United States*, 328 U.S. 750, 757-58, 66 S.Ct. 1239, 1244, 90 L.Ed. 1557 (1946); *Berger v. United States*, 295 U.S. 78, 81-82, 55 S.Ct. 629, 630, 79 L.Ed. 1314 (1935). Accordingly, we have recognized that "[t]he variance rule, to the extent that it is constitutionally required, is more of a due process rule than is the flat fifth amendment prohibition against being tried on an indictment which a grand jury never returned." *United States v. Crocker*, 568 F.2d 1049, 1059 (3d Cir.1977).

Unlike a constructive amendment, a variance can result in a reversible error only if it is likely to have surprised or otherwise has prejudiced the defense. *United States v. Schurr*, 775 F.2d 549, 553-54 (3d Cir.1985). To demonstrate prejudice from a variance, a defendant "must show (1) that there was a variance between the indictment and the proof adduced at trial and (2) that the variance prejudiced some substantial right." *United States v. Balter*, 91 F.3d 427, 441 (3d Cir.1996). "A variance does not prejudice a defendant's substantial rights (1) if the indictment sufficiently informs the defendant of the charges against him so that he may prepare his defense and not be misled or surprised at trial, [or] (2) if the variance is not such that it will present a danger that the defendant may be prosecuted a second time for the same offense." *United States v. Schoenhut*, 576 F.2d 1010, 1021-22 (3d Cir.1978).

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In this case there was not a prejudicial variance between the government's proofs and the terms of the indictment. First, the indictment sufficiently informed Daraio of the charges against her so as to put her on notice to prepare her defense. Indeed, the government's proofs concerning her failure to pay over to the government the full amount of the payroll taxes owed to the United States did not vary from the terms of the indictment.[10] Certainly the evidence of which

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10. Daraio's characterization of the government's proofs is seemingly inconsistent. She argues that she was tried for failure to *withhold* payroll taxes, but in doing so she relies on portions of the trial transcript in which the prosecutor presented evidence of Daraio's failure to *pay*-not her failure to withhold. *See, e.g.*, J.A. at 483 (prosecutor discussing evidence of Daraio's "willful failure to pay over"); Supp.App. at 163-64 (Daraio testifying that she failed to make payments to IRS towards existing payroll tax liability). Indeed, at one point in her brief in this court, Daraio asserts that she was tried for "failing to *pay* the payroll taxes." *See* Appellant's br. at 13 (emphasis added). Moreover, she makes the following puzzling statement in her brief: "The government's theory, in other words, is that [Daraio] willfully failed to withhold payroll taxes so that she could spend the money for personal wants at the time of the failure to withhold." Appellant's br. at 23 (emphasis in original). We are at a loss to understand this comment because a failure to withhold would mean that the employees would receive additional funds over and above what was due them and thus the employer would not retain the funds. Accordingly, the sentence we quote makes sense only if it is referring to a failure to pay over.

Nonetheless, we believe that Daraio intended to use the language as it appears throughout her briefs submitted to this court, and thus intended to argue that the government improperly tried her for "failure to withhold." In any event, we would have rejected her

(Cont'd)

Daraio complains, *i.e.*, that she failed to withhold payroll taxes, is consistent with the allegation in the indictment that "[f]rom in or about April 1994 through in or about April 1998, defendant . . . *failed to pay over the full amount of payroll taxes* owed to the United States on behalf of Eagle Security and its employees totaling approximately $222,607.40." (emphasis added). After all, if an employer has not withheld payroll taxes, it hardly would be expected that she nevertheless would pay them to the government.

The prosecutor filed a pre-trial notice to justify the admission of evidence concerning prior non-compliance for time periods not included in the indictment and acts not charged in the indictment. Therefore, the admission of such evidence did not deprive Daraio of the opportunity to prepare her defense. Moreover, as we shall explain, the court properly admitted the evidence under Rule 404(b). *See infra* Part IV.B (discussing propriety of admission of the Rule 404(b) evidence). Furthermore, the district court repeatedly admonished the jury to limit its consideration of the Rule 404(b) evidence to its appropriate role. Finally, it is clear that even though there was substantial reference at the trial to conduct not within the scope of the indictment, the government proved the material facts of the indictment at the trial and Daraio does not challenge the sufficiency of the evidence. Accordingly, the evidence adduced at trial

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(Cont'd)
argument if she had contended that there had been a constructive amendment or prejudicial variance on the basis of the government improperly having tried her for "failure to pay" the payroll taxes. Notably, the indictment expressly alleged that "Daraio *failed to pay* over the full amount of payroll taxes[.]" J.A. at 597 (emphasis added).

constituted neither a constructive amendment of the terms of the indictment, nor a prejudicial variance from the allegations in the indictment and we therefore will not reverse Daraio's conviction on either of these two bases.

B. ***Evidence of Prior Non-Compliance Under Rule 404(b)***

We also reject Daraio's argument that the district court erred in admitting evidence of her prior tax non-compliance in violation of Rule 404(b). Daraio argues that Rule 404(b) prohibited the admissibility of the prior non-compliance because "[t]he only issue in the case was whether [she] was the person who committed [the crime charged]." Appellant's br. at 30. She asserts that "criminal intent was never in issue at trial," Appellant's br. at 29, and the intent-serving purpose set forth in Rule 404(b) must be more specific and not merely speak to a general criminal intent. Daraio further argues that the evidence lacked probative value, and "was plainly intended to prejudice (and did prejudice) [her.]" Appellant's br. at 36.

Rule 404(b) governs the admissibility of evidence of "other crimes, wrongs, or acts." It provides, in relevant part, that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." We have recognized that "Rule 404(b) is a rule of inclusion rather than exclusion." *Givan*, 320 F.3d at 460 (citing *United States v. Jemal*, 26 F.3d 1267, 1272 (3d Cir.1994)). In general, we favor the

admission of Rule 404(b) evidence when it is relevant for any other purpose than to show the defendant's propensity to commit the charged offense. *Givan*, 320 F.3d at 460 (citing *United States v. Long*, 574 F.2d 761, 764 (3d Cir.1978)).

To demonstrate a proper purpose, the government must "proffer a logical chain of inference consistent with its theory of the case." *United States v. Sampson*, 980 F.2d 883, 888 (3d Cir.1992). After the government has specified such a purpose, unless the reason that the evidence is proper is plainly obvious, the district court must "articulate reasons why the evidence also goes to show something other than character" by putting this "chain of inferences into the record." *Id.* Furthermore, "[w]here such other purposes do exist, protections against improper admission nevertheless remain in Rule 104 relevancy standards and in Rule 403's requirement that probative value yet be balanced against the risk of 'unfair prejudice.' "[11] *United States v. Martin*, 773 F.2d 579, 582 (4th Cir.1985); *see also Government of Virgin Islands v. Pinney*, 967 F.2d 912, 914 (3d Cir.1992) ("Such evidence is subject only to the limitations imposed by Federal Rules of Evidence 402 and 403."). Thus, we apply a four-part test to determine the admissibility of Rule 404(b) evidence: "(1) the evidence must have a proper purpose;

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11. Federal Rule of Evidence 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(2) it must be relevant; (3) its probative value must outweigh its potential for unfair prejudice; and (4) the court must charge the jury to consider the evidence only for the limited purposes for which it is admitted." *Givan*, 320 F.3d at 460.

In cases involving violations of federal tax laws such as tax evasion, "[a] defendant's past taxpaying record is admissible to prove willfulness circumstantially." *United States v. Ringwalt*, 213 F.Supp.2d 499, 506 (E.D.Pa.2002) (quoting *United States v. Bok*, 156 F.3d 157, 165 (2d Cir.1998)), *aff'd*, 66 Fed.Appx. 446 (3d Cir.2003); *see also United States v. Johnson*, 893 F.2d 451, 453 (1st Cir.1990) (unindicted acts of tax fraud that occurred subsequent to the indicted acts admissible in tax evasion prosecution to show intent and absence of mistake when defense based on defendant's reliance on advice of friend); *United States v. Upton*, 799 F.2d 432, 433 (8th Cir.1986) ("Evidence of [defendant's] questionable compliance with tax laws, both in the years prior to and subsequent to [the years of the charged conduct] is probative of willfulness in the present context."). For example, in *United States v. Ringwalt*, the district court admitted defendant's tax returns from previous years, which did not pertain to the charged offense. The court held that, "in light of the defendant's theory that the inaccuracies in the 1994 and 1995 returns were the result of mistake or the fault of the accountants, the tax returns from the earlier years were probative on the issues of common scheme or plan as well as willfulness." 213 F.Supp.2d at 509. The court noted that the defendant's tax returns for the earlier years "showed the existence in those prior years of the identical scheme and plan to evade income taxes that was used by defendant in 1994 and 1995[.]" *Id.*

Similarly, in *United States v. Bok* the defendant was charged and convicted for attempted tax evasion in violation of 26 U.S.C. § 7201 and making false statements on corporate income tax returns in violation of 26 U.S.C. § 7206(1). The Court of Appeals for the Second Circuit upheld the district court's decision to admit evidence such as the defendant's failure to file a state personal tax return as well as the failure of the defendant's corporation to file federal and state corporate returns for the years during and after those involved in the indictment. 156 F.3d at 165. The court held that "a defendant's past taxpaying record is admissible to prove willfulness circumstantially" because such evidence is "indicative of an intent to evade the tax system." *Id. at 165-66; see also United States v. Ebner*, 782 F.2d 1120, 1126 n. 7 (2d Cir.1986) ("The jury may consider evidence of intent to evade taxes in one year as evidence of intent to evade payment in prior or subsequent years.").

Inasmuch as it was essential for the government to make a showing of intent or willfulness to meet its burden of proof in this case, the district court properly admitted evidence of Daraio's prior tax non-compliance under Rule 404(b). Evidence that she committed similar offenses and had a history of non-compliance with the IRS was admissible and relevant to prove willfulness. *See Bok*, 156 F.3d at 165-66. Furthermore, the district court's limiting instructions were adequate to prevent any unfair prejudice to her from the evidence. As in *United States v. Givan*, the district court in this case repeatedly issued limiting instructions regarding the Rule 404(b) evidence in which the court emphasized the limited purpose for which the evidence was admissible, thereby minimizing any prejudicial effect. *See* 320 F.3d at 461-62.

Daraio argues, however, that she did not base her defense on lack of intent or motive, and thus the district court improperly admitted the evidence of her prior tax non-compliance under Rule 404(b). In an abstract sense this argument could be sound because "district courts should generally deem prior bad acts evidence inadmissible to prove an issue that the defendant makes clear he is not contesting. The relevance of the prior bad acts evidence will be minimal in most such cases, since the evidence will not bear on the issues being contested." *Jemal*, 26 F.3d at 1274; *see also United States v. Colon*, 880 F.2d 650, 656 (2d Cir.1989) ("[I]n some circumstances, the nature of a defense put forth by the defendant may reveal that knowledge and intent, while technically at issue, are not really in dispute.") (citation and internal quotation marks omitted). Thus, "the government can not create an issue where none exists and then rely upon Rule 404(b) to argue that prior misconduct is relevant to the manufactured issue." *United States v. Morley*, 199 F.3d 129, 136 (3d Cir.1999).

Accordingly, in considering Rule 404(b) evidence we have agreed with the Court of Appeals for the Fourth Circuit that "the use of prior bad acts evidence must be examined meticulously in each case and . . . the probative value of prior bad acts evidence is significantly less when the defense is that the defendant did not perform the charged act at all." *Jemal*, 26 F.3d at 1273 n. 3. Nevertheless this requirement for meticulous examination of the evidence does not preclude results such as that we reached in *United States v. Balter*, 91 F.3d at 437, in which we allowed testimony revealing the defendant's previous experience as a murderer-for-hire when the "defense was that he was present at the murder scene but

that he did not commit the murder." As we explained, "[t]hese statements were relevant to show, among other things, that he had a financial motive to commit the murder and the intent to do so." *Id.*

We hold that Daraio cannot obtain relief by reliance on the lessened value of Rule 404(b) evidence in cases involving a defense that "the defendant did not perform the charged act at all." *See Jemal*, 26 F.3d at 1273 n. 3. We reach this conclusion because we are satisfied that she did not explain clearly in the district court that she was not contesting the allegation that she had the intent to do the acts the indictment charged but rather contended that she did not do the acts at all. Consequently, she did not eliminate the intent issue from the case and thus the Rule 404(b) evidence was relevant to demonstrate her intent.

In coming to our result on the Rule 404(b) evidence issue, we observe that in her reply to the prosecutor's pre-trial Rule 404(b) notice, Daraio explicitly stated that a "major issue[ ] of dispute will be . . . whether the E.S.S. Co. documents prepared by [her daughter] Cheryl Daraio . . . were prepared *in error without fraudulent intent* or prepared at the direction of [Daraio] as part of the scheme alleged in the indictment." Supp.App. at 342 (emphasis added). That statement was quite clear and set the framework for the case. Thus, it is not surprising that in explaining its initial decision to admit the Rule 404(b) evidence, the district court stated that Daraio squarely had raised the issue of intent. Indeed, we do not see how it could have reached a different conclusion.

We also point out that her attorney argued that she had relied on her tax attorney in deciding to form E.S.S. Co. as a successor corporation to Eagle Security. Plainly this evidence was intended to demonstrate her benign intent. In addition, on cross-examination Daraio admitted that she faxed duplicate invoices, even though she did not prepare them, to an Eagle Security client. Her attorney later explained that she "*did not willfully intend* in the act of faxing those documents to Mr. Talbott, to have any money diverted from [Eagle Security] that should have gone to the IRS, to [E.S.S. Co.]." J.A. at 445 (emphasis added). Therefore, we reject Daraio's assertion that intent was not at issue, and we cannot find on this record that the district court erred as a matter of law or abused its discretion in admitting the Rule 404(b) evidence concerning her prior tax non-compliance.

V. CONCLUSION

For the foregoing reasons the judgment of conviction and sentence entered May 5, 2005, will be affirmed.

APPENDIX B — JUDGMENT IN A CRIMINAL CASE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED AND FILED MAY 3, 2005

UNITED STATES DISTRICT COURT
District of New Jersey

Case Number 04-cr-245(JEI)

UNITED STATES OF AMERICA

v.

DOROTHEA DARAIO

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, DOROTHEA DARAIO, was represented by John R. Crayton, Esq.

The defendant was found guilty on count One Count by a jury verdict on 11/10/04 after a plea of not guilty. Accordingly, the court has adjudicated that the defendant is guilty of the following offense:

Title & Section
26:7201 & 18:2

Nature of Offense
Attempt to Evade or Defeat Tax

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Date of Offense
4/94 - 4/98

Count Number
One

As pronounced on April 29, 2005, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00, for count One, which shall be due immediately. Said special assessment shall be made payable to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this the 3rd day of May, 2005.

s/ Joseph E. Irenas
JOSEPH E. IRENAS
Senior United States District Judge

Appendix B

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 41 Months.

The Court makes the following recommendations to the Bureau of Prisons; that defendant be designated to F.C.I. Danbury. The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons on June 20, 2005.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 3 years.

Within 72 hours of release from custody of the Bureau of Prisons, the defendant shall report in person to the Probation Office in the district to which the defendant is released.

While on supervised release, the defendant shall comply with the standard conditions that have been adopted by this court (on the next page).

The defendant shall submit to one drug test within 15 days of commencement of supervised release and at least two tests thereafter as determined by the probation officer.

If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs,

and restitution that remains unpaid at the commencement of the term of supervised release and shall comply with the following special conditions:

> The defendant shall provide the U.S. Probation Office with full disclosure of her financial records to include yearly income tax returns upon the request of the U.S. Probation Office. The defendant shall cooperate with the probation officer in the investigation of her financial dealings and shall provide truthful monthly statements of her income.
>
> The defendant is to fully cooperate with the Internal Revenue Service by filing all delinquent or amended returns within six months of the sentence date and to timely file all future returns that come due during the period of supervision. The defendant is to properly report all correct taxable income and claim only allowable expenses on those returns. The defendant is to provide all appropriate documentation in support of said returns. Upon request, the defendant is to furnish the Internal Revenue Service with information pertaining to all assets and liabilities, and the defendant is to fully cooperate by paying all taxes, interest and penalties due, and otherwise comply with the tax laws of the United States,
>
> The defendant is prohibited from incurring any new credit charges or opening additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with a payment schedule for any fine obligation. The defendant shall not encumber or liquidate interest in any assets unless it is in direct service of the fine obligation or otherwise has the express approval of the Court.

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STANDARD CONDITIONS OF SUPERVISED RELEASE

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not commit another federal, state, or local crime during the term of supervision.

2) The defendant shall not illegally possess a controlled substance.

3) If convicted of a felony offense, the defendant shall not possess a firearm or destructive device.

4) The defendant shall not leave the judicial district without the permission of the court or probation officer.

5) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

6) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

7) The defendant shall support his or her dependents and meet other family responsibilities.

8) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

9) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

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10) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

11) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

12) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

13) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

14) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

15) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

16) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

* * *

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FINE

The defendant shall pay a fine of $25,000.

This fine, plus any interest pursuant to 18 U.S.C. § 3612(f)(1), is due immediately and shall be paid in full by within 30 days of sentence. It is recommended that the defendant participate in the Bureau of Prisons Inmate financial Responsibility Program. In the event the entire fine is not paid prior to the commencement of supervision, payment will commence within 30 days after release from imprisonment. The court will set the payment plan based on assessment of the defendant's ability to pay at that time.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.